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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

INTERCOLLEGIATE (BIG TEN) CONFERENCE OF FACULTY REPRESENTATIVES, INDIANA UNIVERSITY, UNIVERSITY OF IOWA, UNIVERSITY OF MICHIGAN, MICHIGAN STATE UNIVERSITY, UNIVERSITY OF MINNESOTA, NORTHWESTERN UNIVERSITY, OHIO STATE UNIVERSITY, PURDUE UNIVERSITY and UNIVERSITY OF WISCONSIN,

Petitioners,

vs.

DAVID C. WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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June 1, 1982

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by conditioning removal jurisdiction on policy considerations, not jurisdictional in nature, such as whether removal promoted judicial economy, gave defendant an "unearned" advantage, and involved an undue instrusion upon the state courts.

2. Whether the Court of Appeals erred in assuming that federal jurisdiction existed over an original complaint which had alleged no basis for federal question or diversity jurisdiction.

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Petitioners,

VS.

DAVID C. WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Intercollegiate (Big Ten) Conference of Faculty Representatives ("Conference"),[1] respectfully prays

[1]This petition is filed on behalf of the Conference, a voluntary unincorporated association, and nine of its ten member universities. The nine petitioning member universities are Indiana University, University of Michigan, Michigan State University Purdue University, University of Wisconsin, University of Iowa,

that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 26, 1982.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by conditioning removal jurisdiction on policy considerations, not jurisdictonal in nature, such as whether removal promoted judicial economy, gave defendant an "unearned" advantage, and involved an undue intrusion upon the state courts.

2. Whether the Court of Appeals erred in assuming that federal jurisdiction existed over an original complaint which had alleged no basis for federal question or diversity jurisdiction.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 668 F.2d 962. The opinion of the United States District Court for the Central District of Illinois is reported at 513 F.Supp. 1062.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 26, 1982. A timely petition for rehearing was denied on March 4, 1982. This petition is being timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES CONSTRUED

28 U.S.C. § 1441(a), (b) (1976)

Northwestern University, Ohio State University and University of Minnesota. The tenth member, the University of Illinois, and Neale Stoner and the University of Illinois Athletic Association are also parties to this case and are represented by other counsel.

28 U.S.C. § 1446(b) (1976)

28 U.S.C. § 1447(c) (1976)

The text of these Statutes appears at A-53.

STATEMENT OF THE CASE

The issues presented in this petition concern the right of a defendant to remove a case to federal court. While removal issues are to be solely determined by reference to the plaintiff's complaint, the Court of Appeals in this case has developed a novel test for when removal jurisdiction exists which goes beyond a review of the complaint. Therefore, a summary of events which are not reflected in the plaintiff's complaint is required.

Plaintiff David C. Wilson is a professional football player whose approximately one year enrollment at the University of Illinois en route to the National Football League gave rise to this lawsuit. Before the plaintiff enrolled at the University of Illinois, he played football for and attended some classes at a junior college in California. As a result of a lack of academic progress at the junior college, he was not eligible to play football for the University of Illinois under the academic rules of the Conference of which the University of Illinois is a member.

After enrolling at the University of Illinois, the plaintiff sought a waiver of the Conference eligibility rules so that he could play football during the 1980 and 1981 seasons. He did not obtain the waiver.

Shortly before the 1980 football season began, the plaintiff filed a two count Complaint for Declaratory Judgment and Injunctive Relief in the Circuit Court of Champaign County, Illinois. (A-18). The first count of that complaint alleged that the defendants Neale Stoner, the Athletic Director of the University of Illinois Athletic Association, and the National Collegiate Athletic Association ("NCAA") had deprived him of his rights under the Constitution of the

State of Illinois and the United States Constitution to due process and equal protection by implementing a rule which limited his eligibility for football at the University of Illinois to one season. He sought as relief a declaratory judgment and injunctive relief to play during the 1980 season; he did not pray for money damages. (A-26). The Conference was not named as a party in Count I of this original complaint.

The second count of his complaint alleged that the Conference and its member universities unconstitutionally deprived him of his right to play football. The crux of his complaint was that the Conference's procedure for handling his waiver application was unconstitutionally vague, did not have a proper fact-finding procedure, and involved an undue delegation of authority to its faculty representatives. The plaintiff did not identify in this second count either the constitution or the constitutional provision which the Conference allegedly violated. He sought as relief both injunctive relief as to the 1980 season and an unspecified amount of damages "if appropriate." (A-36).

A preliminary injunction hearing was held in state court on August 27, 1980, and on September 5, 1980 the state court preliminarily enjoined the defendants from interfering with the plaintiff's football career during the fall of 1980. During the preliminary injunction hearing, the defendants Stoner, University of Illinois, and University of Illinois Athletic Association ("Illinois Defendants") supported the plaintiff's request for an injunction. However, the Conference's motion to realign the Illinois Defendants as plaintiffs because of their community of interest with the plaintiff was denied. The Illinois Defendants also refused to join the Conference in an attempt to remove the original complaint to federal court.

After the preliminary injunction was entered, the Conference learned that false information had accompanied the plaintiff's waiver application. In light of this discovery, the state trial court dissolved its own preliminary injunction on September 17, 1980.

On September 18, 1980, the Illinois Appellate Court summoned the parties to appear before it on the next day to argue the merits of the dissolution of the preliminary injunction, even though the plaintiff had not filed a notice of appeal. On September 19, 1980, without the aid of either the trial court record or briefs, the appellate court reinstated the preliminary injunction. The appellate court further ordered that its mandate should issue immediately and informed the Conference that no petition for rehearing would be considered.

The Conference then requested the Illinois Supreme Court to recall the appellate court's mandate because of the irregularities in the appellate court proceeding. The Illinois Supreme Court declined to recall the mandate by a 4-3 vote.

On March 25, 1980, the plaintiff amended his complaint to add new counts which charged that the Conference and nine of its member universities had:

> (a) Deprived him of due process and equal protection under color of state law under the Fourteenth Amendment of the United States Constitution (A-36, Count III ¶ 8);
>
> (b) Deprived him of his rights to travel under the First Amendment of the United States Constitution (A-38, Count III ¶ 17);
>
> (c) Deprived him of his rights to associate under the First Amendment of the United States Constitution (A-38, Count III ¶ 17);
>
> (d) Deprived him of his rights to study under the First Amendment of the United States Constitution (A-38, Count III ¶ 17);
>
> (e) Deprived him of his civil rights under Article IV of the United States Constitution (A-37 to 38, Count III ¶ 16);
>
> (f) Deprived him of his civil rights protected under the Federal Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983 and 1985 (1976) (A-40, Count III ¶ 28);

(g) Violated the Illinois Antitrust Act, Ill.Rev.Stat. ch. 38, § 60 (A-41 to 42, Count IV ¶ 28); and

(h) Discriminated against him because of his sex in violation of Title IX, 20 U.S.C. §§ 1681-1683 (A-44, Count V ¶ 30).

None of the claims appeared in the original complaint. As relief for these new charges, the plaintiff sought $9,000,000 as compensatory damages and $27,000,000 as punitive damages.

Following the filing of the new claims, the plaintiff stipulated to the dismissal of the NCAA. The damage claims against the University of Illinois were dismissed. The Conference then timely removed the case to federal district court on April 8, 1981.

The plaintiff's motion to remand was denied by the district court. The Conference filed a motion for summary judgment as to all the plaintiff's claims and the district court granted that motion on June 29, 1981. The plaintiff appealed from both the denial of his motion to remand and the entry of summary judgment.

On January 26, 1982, the Court of Appeals ruled that the district court should have granted the plaintiff's motion to remand because there was no jurisdiction for removal. The Court of Appeals conceded that it "might agree" that the case was properly removable "[i]f the only interests at stake ... were the private interests of the parties," but nevertheless held that removal was improper because of "policy concerns, jurisdictional in nature and hence not waivable...." (A-10 to 11) The policy concerns controlling removal jurisdiction which were identified by the Court of Appeals included judicial economy, fairness to the parties, the motives of the plaintiff and defendants, and the deference to be accorded by federal courts to state courts.

The Conference's petition for a rehearing was denied on March 4, 1982.

REASONS FOR GRANTING THE PETITION

I. IN DETERMINING WHETHER REMOVAL JURISDICTION EXISTED, THE COURT OF APPEALS TOOK INTO ACCOUNT DISCRETIONARY FACTORS DIRECTLY CONTRARY TO THE DECISIONS OF THIS COURT AND OF LOWER FEDERAL COURTS.

Section 1447(c) of the Judicial Code, 28 U.S.C. § 1447(c) (1976), provides that a removed case may be remanded to state court only if the district court determined that it was removed "improvidently and without jurisdiction." The district court to which this action was removed rejected the plaintiff's motion to remand, finding that the requisites of 28 U.S.C. §§ 1441 and 1446 (1976) had been met.[2] The Court of Appeals reversed that order on the basis that the district court had failed to assess certain "policy concerns, jurisdictional in nature and hence not waivable" by the plaintiff, despite the fact that these concerns were discretionary, not jurisdictional, and had never been raised by either party, by the district court, or by any other federal court in a removal case.

The Court of Appeals conditioned removal jurisdiction upon whether (1) its perceived purposes for the 30 day rule in 28 U.S.C. § 1446(b) ((a) to promote judicial economy, and (b) to deprive a defendant of an "unearned" advantage) would no longer be served; (2) the new federal claims were more "weighty" than those originally advanced; (3) the original claim was abandoned; (4) plaintiff either intentionally

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[2] Without explanation, the Court of Appeals never addressed the district court's decision that removal was proper pursuant to 28 U.S.C. § 1441(c) (1976). Instead, it dealt only with whether removal jurisdiction existed under 28 U.S.C. § 1446(b) (1976). The Conference had advanced both grounds both in the district court and the Court of Appeals. Moreover, the tests which each of the two sections presents are dissimilar so that resolution that removal jurisdiction did not exist under one section would not preclude removal jurisdiction being found to exist under the other.

withheld the filing of, or only after discovery learned of, federal claims until after the 30 day period had run; and (5) removal would unduly intrude upon the state courts.

The Court of Appeals' opinion allowing removal jurisdiction to depend on "policy concerns" conflicts with the Court's holding in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). Moreover, the Court of Appeals' conclusion that such policy concerns are "jurisdictional in nature" is in conflict with opinions of this and lower federal courts and provides a test for removal jurisdiction which is awkward and quite vulnerable to uneven application.

A defendant is afforded the right to remove actions involving federal claims from state court to federal district court by 28 U.S.C. § 1441(b) (1976). The statutory right of removal may be waived if it is not timely exercised. However, where the right of removal has initially been waived, federal courts have consistently held that the right of removal is revived if an amendment to the complaint adds a new and entirely different claim. The principle of revival originated in the Court's decision in *Fletcher* v. *Hamlet*, 116 U.S. 408 (1886). It has been consistently applied by numerous circuit and district courts. *Henderson* v. *Midwest Refining Co.*, 43 F.2d 23 (10th Cir. 1930); *Cliett* v. *Scott*, 233 F.2d 269, 271 (5th Cir.), *cert. denied*, 352 U.S. 917 (1956); *Craig Food Industries, Inc.* v. *Taco Time International, Inc.*, 469 F. Supp. 516 (D.Utah 1979); *Dow Corning Corp.* v. *Schpak*, 65 F.R.D. 72 (N.D.Ill. 1974).

In *Henderson* v. *Midwest Refining Co.*, 43 F.2d 23 (10th Cir. 1930), the right to remove was found to have been revived where a new cause of action was raised even though the facts in the first cause were the same as those advanced in the second. The Tenth Circuit cited the Seventh Circuit's decision in *Galesburg & Kewanee Elec. Ry. Co.* v. *Hart*, 221 F.7, 12 (7th Cir. 1915), as follows:

> " 'Departures occur either where the pleader deserts, in point of fact, the ground that he had first taken, or

> where he puts the same facts on a new ground in point of law'; and this is so although both pleadings may be based on the same transaction." 43 F.2d at 25.

Accordingly, the test as to when a right to remove is revived turns on whether a substantially new cause of action has been added to the complaint, even if it is based on the same set of facts upon which the original claim was based and even if the essential relief sought in the original claim is no different than that sought in the second cause.

The rationale for the revival doctrine is set forth in *Cliett* v. *Scott:*

> "[T]he authorities are overwhelming that, though a defendant has submitted himself to state court jurisdiction on one cause of action, this does not prevent his removing the cause when an entirely new and different cause of action is filed." 233 F.2d at 271.

Accord, Dow Corning Corp. v. *Schpak,* 65 F.R.D. 72, 75 (N.D. Ill. 1974).

In the context of federal question jurisdiction, the revival doctrine promotes principles of federalism that require federal courts to "bear the responsibility of deciding all questions of Federal law." 1980 U.S. Code Cong. & Ad. News 5063.

Except for the elements of whether the new cause is substantially different from the cause originally advanced, the test as to whether the revival doctrine applies is identical to the test used to determine whether a case is removable in the first instance under 28 U.S.C. § 1441(c) or § 1446(b) (1976). *See, e.g., Hearst Corp.* v. *Shopping Center Network, Inc.,* 307 F. Supp. 551 (S.D.N.Y. 1969). Federal courts have uniformly held that removal jurisdiction is to be determined solely by reference to the plaintiff's voluntary actions. *Great Northern Ry. Co.* v. *Alexander,* 246 U.S. 276 (1918); *Powers* v. *Chesapeake & Ohio Ry. Co.,* 169 U.S. 92 (1898). The existence of removal jurisdiction must appear in the well-pleaded allegations of the plaintiff's complaint, not by reference to the pleadings filed by the defendant or to the evidence. *Louis-*

ville & Nashville Ry. Co. v. *Mottley*, 211 U.S. 149 (1908). Concern over matters extrinsic to the pleadings, such as docket congestion or the delay of trial, are "plainly irrelevant" to removal jurisdiction. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 344 (1976). As stated by the court in *Great Northern Ry. Co.* v. *Alexander, supra*, 246 U.S. at 281-82:

> "It is also settled that a case, arising under the laws of the United States, non-removable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of the court upon any issue tried upon the merits, but that such conversion can only be accomplished by the voluntary amendment of his pleadings by the plaintiff or, where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or of parties defendant. *Kansas City & c. Ry. Co.* v. *Herman*, 187 U.S. 63; *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U.S. 206; *Lathrop, Shea & Henwood Co.* v. *Interior Construction Co.*, 215 U.S. 246; *American Car & Foundry Co.* v. *Kettlehake*, 236 U.S. 311.
>
> "The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case non-removable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, *in invitum*, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion."

Accordingly, the Court and all lower federal courts which have addressed removal jurisdiction and the revival doctrine have concluded that the plaintiff's voluntary act of amending his complaint to add a substantially new cause, evident from his complaint only, revives the right to remove. Moreover, exercise of the right is not to be thwarted by "policy considerations."

The Conference's Petition for Removal was based on the Amended Complaint, the pleading that provided the Conference with its first viable opportunity for removal. The March 25, 1981 amendment raised several federal claims, all new to the case and all substantially different from those claims originally advanced. These new claims were brought under the First Amendment, Fourteenth Amendment, and Article IV of the United States Constitution; Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, *et seq.* (1976); and three sections of the Federal Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983 and 1985 (1976); they sought declaratory relief that plaintiff was entitled to play football in 1981; and they claimed compensatory and punitive damages in the amount of $36,000,000. In contrast, the original claim against the Conference, found in Count II of the original Complaint, sought only declaratory and injunctive relief as to whether plaintiff could play football in 1980 and contained no reference whatsoever to the laws or Constitution of the United States. Plaintiff's voluntary amendment to his Complaint raising these new federal claims waived any right he had to rely on the 30 day rule in paragraph 1 of 28 U.S.C. § 1446(b) (1976), and the Conference's right to remove was thereby revived. *Cliett* v. *Scott*, 233 F.2d 269 (5th Cir.), *cert. denied*, 352 U.S. 917 (1956).

The Court of Appeals agreed that removal of the Amended Complaint, if considered without reference to its new test, would be removable, stating: "If the only interests at stake in this litigation were the private interests of the parties, we might agree with the district judge that the case was properly removed to Federal Court." (A-10). However,

instead of limiting its focus to the new federal claims voluntarily added to the Complaint, as was required by the Court's holdings in *Thermtron, Great Northern Ry. Co.*, and *Powers*, the Court of Appeals took into account (1) whether its perceived purposes for the 30 day rule, (a) judicial economy and (b) depriving defendant of an "unearned" tactical advantage, would be served; (2) plaintiff's motives for delaying the filing of the amendment or defendant's tactics in not initially removing; (3) whether the original claim was abandoned; (4) whether the original claim was more or less weighty than the new claims; and (5) whether removal would intrude unduly upon state courts, thereby offending the Court of Appeals' version of federalism.

This analysis is awkward, in conflict with the Court's holdings and those of lower federal courts, and poses substantial risks of uneven application of the removal statutes giving district judges license to use discretionary concerns to determine the existence of removal jurisdiction. We address below each of the Court of Appeals' positions.

A. Policy Concerns May Not Influence Removal Jurisdiction.

The Court of Appeals' ruling allowing policy concerns to influence whether removal jurisdiction exists contradicts the Court's holding in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). There, a district court remanded an action because of docket congestion. The Sixth Circuit denied defendant's Petition for Mandamus to review the remand order. This Court reversed, holding that discretionary issues such as a comparison of the dockets of the state and federal courts could not be taken into account in determining whether a case had been removed "without jurisdiction" under 28 U.S.C. § 1447(c) (1976). The "general considerations" described by the Court of Appeals as jurisdictional are precisely the type of issues this Court held in *Thermtron* could not be termed jurisdictional.

The best articulation of the disarray that will result from raising discretionary factors to jurisdictional status comes from the Seventh Circuit itself in *Ryan* v. *State Board of Elections*, 661 F.2d 1130 (7th Cir. 1981). There, a complaint was removed to the district court, which granted a motion to remand based on the doctrine of abstention. The Seventh Circuit reversed and held that the district court could not remand unless it was without jurisdiction or if removal had been improvident. The Court noted that the term "improvidently" in § 1447(c) refers to instances where statutory, nonjurisdictional requirements for removal have not been satisfied, and it held:

> "Abstention is a judicially-created doctrine; its application is discretionary. Under *Thermtron* a federal court with jurisdiction over a removed case may not remand it on discretionary grounds. Congress never intended 'to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.' *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 351, 96 S.Ct. 584, 593, 46 L.Ed.2d 542 (1976)." 661 F.2d at 1134.

To allow federal courts to take into account policy concerns, such as those chosen by the Court of Appeals, in determining whether federal removal jurisdiction exists converts jurisdiction into a matter of discretion and promotes uneven application of the federal laws. Whether jurisdiction exists should not involve guesswork. The Court's holding in *Thermtron* and 28 U.S.C. § 1447(c) (1976) require an analysis of removal jurisdiction free of discretionary principles or policies. Courts which have dealt with the revival doctrine have consistently applied it within the confines of the holding in *Thermtron*. There is no need to promote a new and, in fact, unworkable test for revival.

B. Whether the Purposes Behind the 30 Day Rule in 28 U.S.C. § 1446(b) ¶ 1 (1976) Are Satisfied is Immaterial to Removal Jurisdiction

Removal is never conditioned upon defendant's satisfying the Court of Appeals' perceived purposes behind the 30 day rule. Those purposes, the Court of Appeals believed, were (1) to prevent the waste of resources which results when a federal court duplicates or ignores a state court's actions, and (2) to deprive a defendant of an "unearned" tactical advantage of delaying beyond 30 days his decision to remove to see how he will fare in state court. Whether or not these are the reasons for the 30 day rule, they should have no influence on removal jurisdiction.

Removal is governed solely by reference to the plaintiff's well-pleaded allegations. *Louisville & Nashville Ry. Co.* v. *Mottley,* 211 U.S. 149 (1908). Revival is governed, at least in the context of federal question jurisdiction, solely by whether a new federal claim is advanced which was not part of the original case and which substantially changes the case. *Henderson* v. *Midwest Refining Co.,* 43 F.2d 23 (10th Cir. 1930); *Craig Food Industries, Inc.* v. *Taco Time International, Inc.,* 469 F. Supp. 516 (D.C.Utah 1979). So long as this test is met, the right to remove is revived. Whether the district court will be involved in duplicating or undoing preliminary actions of the state court is irrelevant to the issue of whether removal jurisdiction exists. In fact, 28 U.S.C. § 1450 (1976) contemplates that any injunction, order or other proceeding by a state court in a removed action "may be dismissed or modified by the district court."

Moreover, other federal courts which have addressed the question of revival have not been concerned with the progress of the state court action which was interrupted by removal. For example, in *Henderson* v. *Midwest Refining Co.,* 43 F.2d 23 (10th Cir. 1930), the defendant removed only after the plaintiff's first complaint had been dismissed. The Tenth Circuit Court of Appeals did not regard either the dismissal or the fact that the state court had made a substan-

tive ruling as relevant to whether removal jurisdiction existed. Similarly, in *Cliett* v. *Scott*, 233 F.2d 269 (5th Cir. 1956), *cert. denied*, 352 U.S. 917 (1956), ten years elapsed between the filing of the complaint and the filing of the amendment which revived the defendant's right to remove. Yet that court did not find jurisdiction affected by the activity in state court.

Furthermore, other federal courts to which state court actions were removed have accepted jurisdiction even after preliminary decisions were reached in state court and have even undone those state court decisions. See *Daniels* v. *McKay Machine Co.*, 607 F.2d 771 (7th Cir. 1979); *Quinn* v. *Aetna Life & Casualty Co.*, 616 F.2d 38 (2nd Cir. 1980); *Hill* v. *United States Fidelity & Guaranty Co.*, 428 F.2d 112 (5th Cir. 1970), *cert. denied*, 400 U.S. 1008 (1971); *FDIC* v. *First Mortgage Investors*, 485 F. Supp. 445 (E.D.Wis. 1980). Only under the Court of Appeals' approach has the amount of activity in state court ever been accorded jurisdictional significance.

The unsoundness of the Court of Appeals' judicial economy analysis is apparent when applied to an injunction case, such as this was initially. In a suit seeking injunctive relief, virtually all in-court activity occurs well within the first thirty days. Yet, so long as there is no final ruling on the merits, a defendant may remove to federal court, if the complaint is removable, on the thirtieth day, even if a preliminary injunction has been issued, regardless of his motives. 1A Moore's Federal Practice ¶ 0.157[9]; *Baker* v. *National Boulevard Bank*, 399 F. Supp. 1021, 1022 (N.D.Ill. 1975).

The Court of Appeals' concern that removal gives defendant an "unearned" tactical advantage is also irrelevant. Removal may or may not benefit a defendant. However, since only the plaintiff's voluntary pleading governs removal, whatever advantage defendant derives may not be regarded as undue. No court has ever conditioned removal on a measure of how deserving the defendant is of removal.

The revival doctrine, like paragraph 2 of 28 U.S.C. § 1446(b) (1976), which provides that an amendment to a complaint can render a case removable that was not removable originally, is an important exception to the 30 day rule. As an exception, it need not satisfy the purposes of that rule. The policy concerns which the Court of Appeals read into the 30 day rule are not relevant to determining the existence of removal jurisdiction.

Moreover, the 30 day rule is but a small and non-jurisdictional part of general removal statutes. 1A Moore's Federal Practice, ¶ 0.168[3.-5] at 490-91; *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 98 (1898); *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U.S. 339 (1913); *Meyers-Arnold Co.* v. *Maryland Casualty Co.*, 248 F. Supp. 140, 146 (D.S.C. 1965). It may be waived by plaintiff without regard to whether the 30 day rule's purposes have further value. *See Haun* v. *Retail Credit Co.*, 420 F. Supp. 859, 863 (W.D. Pa. 1976). The Court of Appeals has concluded that the 30 day rule, and its purposes, are jurisdictional. However, as the Court stated in *Powers*:

> "But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel." 169 U.S. at 98 (citations omitted).

Satisfaction of the purposes of the 30 day rule is immaterial to federal removal jurisdiction.

C. The Parties' Motives Are Not Relevant to a Determination of Whether Removal Jurisdiction Exists.

The Court of Appeals' analysis as to whether removal jurisdiction exists is also infirm because it takes into account defendant's motives (whether a defendant originally waited to see how he would fare in state court) and plaintiff's motives (whether he intended to withhold his weighty claims or learned of them in discovery after the 30 day

period expired). Motives are immaterial to whether jurisdiction exists. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 344 (1976); *Fugard* v. *Thierry*, 265 F. Supp. 743, 748 (N.D.Ill. 1967). The Court of Appeals suggested that the Conference acted improperly in attempting to remove the case. Not only is the speculation without basis, it is immaterial as well. As stated by the district court in *Minkoff* v. *Scranton Frocks*, 172 F. Supp. 870, 875-76 (S.D.N.Y. 1959):

> "I do not understand how a party can be guilty of 'bad faith' in exercising the statutory right of removal, in any event absent an agreement not to exercise that right."

Moreover, assessing motives is unworkable and vulnerable to error. For example, the Court of Appeals determined, without basis, that the Conference had taken a wait-and-see attitude in state court to determine how it would fare, and only after it found that things were not going well was removal sought. This speculation is in error. Within the first thirty days from the filing of the Complaint, the Conference was summoned to the Illinois Appellate Court by a telephone call from its clerk and three of its judges to appear before them the next day for a hearing on the propriety of the state trial court's dissolution of its preliminary injunction. No notice of appeal had then been filed. The court explained it had taken judicial notice from the "news media" of the proceedings below. On September 19, 1980, on the day of the hearing, within the thirty days from the filing of the Complaint, without the benefit of any briefs or a review of the record of proceedings before the state trial court, the Appellate Court reinstated the injunction. The Conference certainly knew before the removal period expired that it was not faring well in state court. It did not "choose" to stay in state court. It remained in the state court because the Complaint failed to state a federal claim and because the Conference's co-defendants, other than the NCAA, refused to consent to removal. If motives were relevant, under the Court of Appeals' theory plaintiff's tactics in failing to state

a federal claim at the outset and in naming friendly defendants who would not consent to removal favor denial of the motion to remand.

D. Revival of the Right to Remove Does Not Depend Upon Whether in Advancing New Claims, the Original Claim is Abandoned.

The Court of Appeals stated that whether a right to remove is revived turns, in part, on whether the original claim was abandoned. However, federal courts finding that a right to remove was revived have not required such abandonment. In *Henderson* v. *Midwest Refining Co.*, 43 F.2d 23 (10th Cir. 1930), the Court of Appeals held defendant's right to remove was revived even though there was no abandonment of the facts, theories or objective advanced in the first complaint. In *Henderson*, plaintiffs alleged that they had exclusive rights to certain oil leases for which they had filed applications with a Wyoming State board, but the board had given the leases to two other parties, assignors of the defendant. A demurrer to the complaint was sustained. An amendment was filed stating the same facts originally alleged and charging a conspiracy between the defendant, his assignors and the board to defraud plaintiffs. The case was removed to the district court which sustained a demurrer to the amended complaint. The Court of Appeals affirmed that the right to remove was revived by the filing of the amendment, even though both causes were based on the "same transaction" and both alleged fraud relating to the same properties, since the first cause was principally an action in equity (seeking an accounting plus damages) and the second sought damages only. There was no abandonment of the original facts, theories, target or objective. Yet the right to remove was revived.

In *Cliett* v. *Scott*, 233 F.2d 269 (5th Cir.), *cert. denied*, 352 U.S. 917 (1956), the right to remove was revived where the original complaint, seeking a money judgment regarding property, was amended ten years later to add an alternative theory for trespass to try title with respect to the same

property. In *Craig Food Industries, Inc.* v. *Taco Time International, Inc.*, 469 F. Supp. 516 (D.C. Utah 1979), the right to remove was revived where the original six-count complaint for declaratory judgment as to a license agreement to operate a fast-food franchise under the trademark "Taco Time" was amended twenty-one months later, adding a seventh count against the same defendant under the Lanham Act concerning the validity of the Taco Time trademark. In *Dow Corning Corp.* v. *Schpak*, 65 F.R.D. 72 (N.D.Ill. 1974), the right to remove was revived where the original complaint for a declaration of the validity of a covenant not to compete was amended five months later to add claims for breach of two separate contracts against the same defendant. In none of these cases was revival dependent on the plaintiff's abandonment of his original cause. The Court of Appeals' decision suggesting abandonment is a prerequisite to revival is in conflict with other Circuit Courts of Appeals.

E. The Merit or "Weightiness" of the New Claims is not Relevant to a Determination of Removal Jurisdiction.

The Court of Appeals determined that a defendant's right to remove depends upon what merit the federal court attaches to the new federal claims. This position conflicts with the Court's holding in *Great Northern Ry. Co.* v. *Alexander, supra*, that removal jurisdiction is not dependent upon an analysis of the merits of plaintiff's claims. At issue only is whether the claims are well-pleaded and, if so, whether they are substantially different from those advanced originally.

The Court of Appeals' comparative weightiness analysis is also infirm since it undercuts an important principle of federalism that federal courts should bear responsibility for dealing with federal claims since they are more familiar with them than state courts. The Court of Appeals went just far enough to conclude the federal claims were "make-

weights" but not far enough to affirm their dismissal.[3] Thus, the Court of Appeals is sending the federal claims back to the state court not for dismissal, but for the state court to be given an opportunity to second-guess the district court's and Court of Appeals' judgments that these claims are without merit. Yet, due to the relative inexperience state courts have with these types of federal claims, there is little assurance that a state court will view the federal claims in the same light that the two federal courts have. This potential for disparate treatment cuts at the heart of federalism which promotes uniform application of federal laws.

Moreover, were the state court to rule that the federal claims which the district court dismissed and the Court of Appeals termed "makeweights" were meritorious by misapplication of federal law, defendant would have no practical recourse. Furthermore, the misapplication of federal law by state courts is the very problem that federal question removal is intended to avoid.

The greatest problem with the Court of Appeals' weightiness theory is that it ignores reality. To suggest that an amendment which contains six federal claims and one state claim, all new to the case, and which seeks $36,000,000 in damages is less "weighty" than a two-count complaint for injunctive and declaratory relief regarding plaintiff's right to participate in a football season which had already passed by the time the amendment had been filed, taxes credulity. The facts that this amendment substantially changed the entire case and that the amendment revived the Conference's right to remove cannot be reasonably contested.

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[3]The Court of Appeals implied, erroneously, that the district court regarded the new federal claims to be of less merit than the original claim advanced. The district court drew no such distinction. It granted summary judgment on all claims.

F. Whether Removal Involves an Intrusion Upon the State Court is Immaterial to Federal Jurisdiction.

The Court of Appeals stated that in dealing with removal, district courts must display a "sensitivity to the danger of encroaching unduly on the authority of the state courts." (A-14). Yet this sensitivity is simply a substitute for the doctrine of abstention and as the Court of Appeals stated in *Ryan*:

> "Abstention is a judicially created doctrine; its application is discretionary. Under *T' rmtron* a federal court with jurisdiction over a remove . case may not remand it on discretionary grounds." 661 F.2d at 1134.

Moreover, the sensitivity to which the Court of Appeals refers stems from, in its analysis, the amount of time the case was pending in state court, the fact that the state court may have already entered a preliminary or non-final ruling and that there are state claims in which the state has an interest. These grounds are immaterial to jurisdiction.

First, neither the amount of time a case has been in state court nor even the entry of preliminary rulings in state court has any bearing on removal jurisdiction. *Daniels* v. *McKay Machine Co.*, 607 F.2d 771 (7th Cir. 1979); *Quinn* v. *Aetna Life & Casualty Co.*, 616 F.2d 38 (2nd Cir. 1980); *Hill* v. *United States Fidelity & Guaranty Co.*, 428 F.2d 112 (5th Cir. 1970), *cert. denied*, 400 U.S. 1008 (1971).

Second, the Court of Appeals acknowledged that the state court had only a "somewhat attenuated" interest in the case since every claim, even the state claims, depended on federal statutes and federal case law for their resolution.

The Court of Appeals agreed that at a minimum the federal claims might have been retained by the district court and that all of the state claims depended upon federal statutes and case law for their resolution. (A-14). However, while realizing the strong interests the federal court had in all of the claims, including the state causes of actions, and the "somewhat attenuated" interests the state court had, the

Court of Appeals concluded this contrast to be "iron[ic]" and "idiosyncratic." (A-14). This analysis is unsound. A more logical conclusion to be drawn from the fact that all of the claims require analysis of federal laws and federal cases is that the federal, not the state, court should have retained the case.

Furthermore, the Court of Appeals raised the issue of abstention in the context of federalism. However, its analysis represents a brand of "New Federalism" calling for state courts to hear federal claims.

In the legislative history of the Act which repealed the $10,000 requirement for federal question jurisdiction, it was stated:

> "[Repealing the $10,000 requirement] represents sound principles of federalism by mandating that the Federal courts should bear the responsibility of deciding all questions of Federal law. At the same time, it demonstrates an increased respect for the States by providing that Federal claims should not be forced on the overburdened state court system." 1980 U.S. Code Cong. & Ad. News 5063.

See also, American Law Institute, *Study of The Division of Jurisdiction Between the State and Federal Courts* 166-67 (1969); Currie, *The Federal Courts and the American Law Institute, Part II,* 36 U.Chi. L.Rev. 268 (1968); M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 53 (1980).

Third, the Court of Appeals' emphasis on avoiding undue intrusion upon the state court is based on what the Court of Appeals termed the state court's entry of "a preliminary adjudication on the merits." (A-15). However, the state court never made an adjudication on the merits, preliminary or otherwise. The Illinois Appellate Court did reinstate a preliminary injunction, within 48 hours following its dissolution by the state trial court, to allow plaintiff to play in a football game the next day and for the balance of the 1980

season. Yet the entry of a preliminary injunction does not constitute an adjudication on the merits. *Berrigan* v. *Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974). Moreover, the Illinois Appellate Court's decision, in view of the haste with which it had been reached and in view of that Court's complete disregard for appellate procedures, deserves no sensitivity from the federal court system.

The Court of Appeals' opinion is flawed because it turns federalism on its head by deferring to state courts federal claims and because it allows immaterial policy concerns to influence jurisdiction contrary to the Court's holding in *Thermtron*.

The Conference's right to remove under 28 U.S.C. §§ 1441(c) and 1446(b) (1976) most certainly revived upon the voluntary filing of the March 25, 1981 amendment. The district court's decision denying remand was sound. The test which the Court of Appeals used to review the district court's decision is unworkable and in conflict with holdings of this Court and lower federal courts.

II. THE COURT OF APPEALS PRESUMED THE EXISTENCE OF A FEDERAL CLAIM IN THE ORIGINAL COMPLAINT EVEN THOUGH SUCH A CLAIM WAS NOT ADVANCED.

The Court of Appeals' opinion states, without extensive discussion, that the original Complaint filed in this action was removable. (A-10). This conclusion is apparently based on the Court of Appeals' erroneous assumptions that the original Complaint asserted a claim against the Conference under both the Federal and Illinois Constitutions and that it sought both an injunction and damages. (A-9). In fact the original Complaint did not contain a federal claim alleging the requisite jurisdictional amount and could not have been removed.

The original Complaint contained two counts. Count I sought relief against the NCAA and other defendants. Count II sought relief against the Conference and other

defendants. (A-18 to 19, 26). Although both counts prayed for an injunction, neither claimed a specified dollar amount of damages; in fact, Count I stated that the injury it alleged was "not compensable by money damages" (A-24, Count I ¶ 24), and Count II sought damages only "if appropriate" (A-33). The state court had found the original Complaint failed to seek the type of monetary relief necessary for plaintiff's jury demand to be permissible under state practice. Furthermore, Count II, the only count against the Conference, and the only count with even a hint of a request for monetary relief, asserted only that plaintiff's "constitutional" rights had been violated, without specifying which constitution. Such an allegation is insufficient to demonstrate a federal source for plaintiff's claim. *Department of Mental Hygiene* v. *Kirchner,* 380 U.S. 194, 200 (1965); *Larsen* v. *Waddell,* 516 F. Supp 1353, 1355 (W.D.Pa. 1981); *Hearst Corp.* v. *Shopping Center Network, Inc.,* 307 F. Supp. 551, 556 (S.D.N.Y. 1969); 1A Moore's Federal Practice ¶ 0.168[3.–5] p. 484 n.32.

Professor Moore has stated:

> "A defendant should not be forced to speculate whether a suit is properly removable. As Judge Murrah suggests in Ardison v. Villa (Ca. 10th 1957) 248 F.2d 226, 227, . . . the underlying purpose of § 1446(b) is to permit the removal period to begin only after the defendant is able to ascertain intelligently that the requisites of removability are present." 1A Moore's Federal Practice, ¶ 0.168[3.–5] p. 484 n.32.

It was not until the Amended Complaint was filed that the plaintiff alleged a specific dollar figure for his new claims. The amendment asserted for the first time six discrete claims based on federal law, and each of them was for the first time assigned a dollar value.

Because the Court of Appeals had erroneously found the original Complaint removable, it then proceeded to what for it was the next logical step, a presumption that this right to

remove had been waived and an analysis of the Amended Complaint under the revival doctrine, which we have shown previously it misapplied. This entire misdirection of effort could have been avoided had the court correctly found that the original Complaint was not removable for the reason that it did not contain a federal claim and that the removability of the Amended Complaint was governed by 28 U.S.C. § 1446(b)¶ 2 (1976) rather than the revival rule.[4] Instead, to reach a result that restricts removal in one class of cases, the Court of Appeals has rendered an opinion that would greatly expand removal in a large class of cases by effectively abolishing the jurisdictional amount requirement.

The overwhelming weight of the decisions of this Court and Circuit Courts of Appeals has been that for removal jurisdiction to exist under § 1441(b), a well-pleaded complaint must contain all the prerequisites for a federal question claim, including the jurisdictional amount of $10,000.[5] This Court and every federal Court of Appeals but the Seventh

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[4]Diversity removal under 28 U.S.C. § 1441(a) (1976) was not available under the original Complaint due to the presence of Illinois citizen defendants and defendants whose connection with the sovereign rendered them "states" under Article III of the U.S. Constitution. 1A Moore's Federal Practice ¶ 0.161[1] pp. 197-98, 202-03. Removal under 28 U.S.C. § 1441(c) (1976) was also unavailable under the original Complaint because the claims asserted in Counts I and II arose out of a common nucleus of operative facts and were therefore pendent, rather than separate and independent (A-10). 1A Moore's Federal Practice ¶ 0.163[4.-5] pp. 270-71.

[5]This requirement was in effect in August of 1980, when the original Complaint was filed. It was not repealed until December 1, 1980, by P.L. 96-486, 94 Stat. 2369 (codified at 28 U.S.C. § 1331 (a)(Supp.IV 1981)). The repealing act, of course, did not of itself render the Complaint removable, since under the rule of voluntary action, it is only the plaintiff's act, and not that of the legislature, that can render a non-removable complaint removable. *Martropico Compania Naveria S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamania)*, 428 F. Supp. 1035 (E.D.N.Y. 1977).

Circuit have adhered to this requirement and have refused to find removability where a dollar figure in excess of the jurisdictional amount does not appear on the face of the complaint. *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938). In recent years, the Seventh Circuit has attempted to expand the application of this rule by finding jurisdiction is present if the benefit to the plaintiff *or* the detriment to the defendant could reasonably be expected to exceed $10,000, even where the complaint seeks no damages. *McCarty* v. *Amoco Pipeline Co.*, 595 F.2d 389 (7th Cir. 1979). That decision stretched the well-pleaded complaint rule beyond its previous limits, since it abandoned the four corners of the complaint to determine the presence or absence of the jurisdictional amount.

With its opinion in this case, the Court of Appeals has now pushed the well-pleaded complaint rule past its breaking point, by finding that the jurisdictional amount requirement is satisfied where one non-federal count of a complaint seeks damages "if appropriate" without specifying a dollar amount, and with no further facts in the record to indicate plaintiff's potential damages or defendant's potential detriment. In fact, this reference to damages was an afterthought to a non-federal claim seeking declaratory and injunctive relief. Consequently, the reference is superfluous, and under the "well-pleaded complaint" rule, the original Complaint was not removable. The Court of Appeals abandoned the jurisdictional amount requirement by reading it out of the statute.[6] Despite the clearly expressed intention of Congress, a complaint seeking an unspecified amount of money will be removable without regard to the monetary damages that will be incurred by the defendant in the Seventh Circuit but in no other circuit.

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[6]The jurisdictional amount issue is of great importance for future cases since it remains a requirement for removal under § 1441(a) based on diversity jurisdiction and, presumably, for removal under § 1441(c) based on non-federal separate and independent claims.

The Complaint was also not removable because during the first thirty-day period the Conference could not obtain the consent of co-defendants, the Illinois Defendants, to remove. In fact, on September 2, 1980, following the preliminary injunction hearing, during which the Illinois Defendants stated to the court that they favored the issuance of a preliminary injunction against the Conference (A-46 to 47), the Conference moved to realign the Illinois Defendants as plaintiffs. The Illinois Defendants objected, stating that the motion, if sustained, would aid removal. (A-49). The motion was denied.[7]

Accordingly, the original Complaint was not removable. The Conference's right to remove first arose upon plaintiff's filing of the March 25, 1981 amendment pursuant to 28 U.S.C. § 1446(b)¶ 2 (1976). The Court of Appeals' opinion which assumed the existence of federal jurisdiction from the original Complaint, where none existed, conflicts with the Court's opinion in *St. Paul Indemnity Co.* v. *Red Cab Co., supra*. The Court should resolve this conflict.

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[7] In February, 1981, plaintiff confessed to a motion by the University of Illinois dismissing it from any damage claims. (A-52). The March 25, 1981 amendments were directed only against the Conference. These amendments provided the first opportunity the Conference had to remove without having to obtain the consent of the Illinois Defendants who by then had become nominal parties. See 1A Moore's Federal Practice, ¶ 0.168[3.-5] p. 486 n. 32.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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